



**Australian Government**

**Department of Defence**  
Capability Acquisition and  
Sustainment Group

# ASDEFCON Liability Regime



- ASDEFCON approach to liability
  - Liability Principles
  - Allocation of liability and types of fault
  - Commonwealth Property and Supplies
  - Government Furnished Facilities
  - Indemnities, liability caps and exclusions
  - Standards, warranties and Defect rectification

# ASDEFCON approach to liability

- Liability provisions historically the subject of extensive negotiations
- Aim of the new liability regime is to achieve contractual outcomes that reflect:
  - an efficient and commercially realistic risk allocation consistent with Commonwealth law and policy
  - risk positions considered and endorsed by Defence at a corporate level

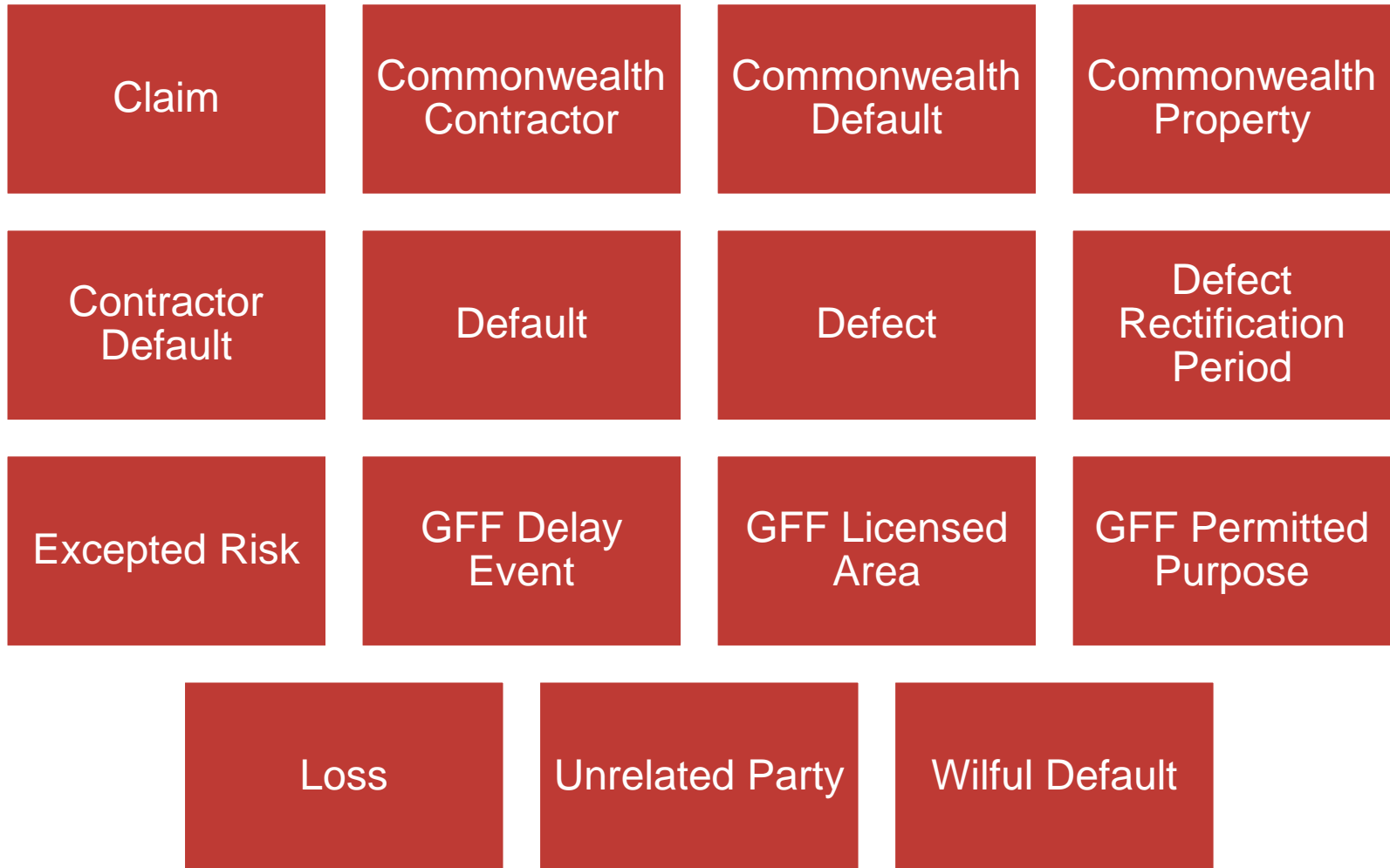
# ASDEFCON approach to liability

The liability regime is given effect to by multiple provisions:



# ASDEFCON approach to liability

## Key liability definitions:



# Defence Liability Principles

- 19 Defence Liability Principles
- Agreed with Defence Industry
- Provide the rationale for the ASDEFCON risk and liability positions
- They are a package – cannot pick and choose which ones to apply
- Departures to be made only with specialist legal and contracting advice

# Defence Liability Principles

## 1. Law and policy

The allocation of liabilities as between the parties to a Defence contract will be consistent with, and give effect to, applicable Commonwealth law and policy.

## 2. Allocation of risk

Defence contracts will generally allocate risks to the party best placed to manage the risks.

# Defence Liability Principles

## 3. Liability to be borne by party at "fault"

Liability should be borne by the party at "fault". In general, the liability of a party will be reduced to the extent that the party demonstrates that the other party or an Unrelated Party is at fault, or in the event there is an Excepted Risk.

## 4. No exclusion of general law

Defence contracts will generally preserve the parties' general law and statutory rights, except to the extent expressly limited or excluded by the terms of the Contract.



# Defence Liability Principles

## 5. Acceptance Milestones

Acceptance or Final Acceptance does not, of itself, limit the Commonwealth's rights under the Contract.

## 6. Defects

Contractor will be required to remedy Defects within the Defect Rectification Periods. Commonwealth will not be required to establish Contractor fault.

## 7. Standards of work and fitness for purpose

Contractor required to ensure that:

- Supplies conform to the requirements of the Contract
- work is carried out in accordance with the specified standards, all applicable laws and good industry practice
- Supplies are fit for the purposes provided for in the Contract

# Defence Liability Principles

## 8. Commonwealth Property controlled by the Contractor

Contractor liable to compensate the Commonwealth for loss of or damage to Commonwealth Property while it is:

- on Contractor premises or GFF if Contractor has physical access control
- being transported by or on behalf of the Contractor

## 9. Commonwealth Property not controlled by the Contractor

Contractor will be liable to compensate the Commonwealth for loss of or damage to Commonwealth Property arising from a Contractor Default.

## 10. Excepted Risks

Contractor's liability will, in general, be reduced by Excepted Risks not caused by and that could not reasonably have been prevented by the Contractor:

- acts of God, including natural disasters
- war, invasion, acts of foreign enemies, hostilities between nations, terrorist acts etc
- confiscation by governments or public authorities
- ionising radiation, contamination by radioactivity, or combustion of nuclear fuels

# Defence Liability Principles

## 11. Contractor employees and officers

Contractor will be liable for any Loss arising from a personal injury to or death of the Contractor's employees or officers.

## 12. Third party claims

Contractor will be liable for any Loss that the Commonwealth suffers as a result of third party claims arising from a Contractor Default, including:

- the death of or personal injury to any person (other than Contractor personnel)
- loss of or damage to property of the third party
- infringement of the third party's intellectual property rights or moral rights
- a breach of duty of confidence owed to the third party

# Defence Liability Principles

## 13. Liquidated damages

Contracts may include liquidated damages for delay in providing Supplies under the Contract. This will be the Commonwealth's sole monetary remedy in relation to the delay.

## 14. Commonwealth indemnities

Defence contracts will not, except in exceptional circumstances, provide for an indemnity from the Commonwealth in favour of the Contractor.

# Defence Liability Principles

## 15. Liability caps

Defence contracts will generally include caps on Contractor liability to the Commonwealth for:

- loss of or damage to Defence Property (other than the Supplies)
- liquidated damages (including the value of any agreed compensation in lieu)
- loss of or damage to Supplies (including loss of use) and other Losses suffered by the Commonwealth

Defence contracts may also include a single liability cap covering all liability of the Contractor to the Commonwealth (will not be less than the aggregate of the individual liability caps).

# Defence Liability Principles

The liability caps under a Defence contract will **not** apply to a liability of the Contractor to the Commonwealth, under or arising out of the Contract in relation to:

- third party claims in respect of death, personal injury or third party property
- infringement of intellectual property rights
- breach of an obligation of confidence
- death of, or injury to, a Commonwealth Officer
- loss of or damage to Commonwealth Property (other than Defence Property)
- breach of the Contractor's obligations in relation to Defence security
- breach of privacy legislation
- criminal offences
- Wilful Default of the Contractor or Contractor Personnel
- repudiation due to an intentional abandonment of the Contract by the Contractor
- restitution of amounts paid under a mistake of fact or law in relation to the Contract

## 16. Exclusions from liability caps

## 17. Consequential or indirect losses

No general exclusion for "consequential loss", "indirect loss" or any such similar expressions. However, Defence contracts will provide specific exclusions for loss capable of clear definition:

- damage to reputation or exemplary or punitive damages
- diminished revenue, profits or business opportunity suffered by the Commonwealth



# Defence Liability Principles

## 18. Proportionate liability

Defence contracts will, so far as the law allows, exclude the operation of the proportionate liability legislation.

## 19. Subcontractors

Contractor will remain responsible for its Subcontractors and their personnel. Contractor's liabilities under the Contract are not reduced by the acts or omissions of a Subcontractor or Subcontractor personnel.

# Allocation of risk and liability

Liability / risk allocated to Contractor	Fault based?	Reduction if loss or damage contributed to by:			Limit?
		Commonwealth Default	Breach by an Unrelated Party	Excepted Risk	
Loss of or damage to Commonwealth Property at Contactor's premises / transported by Contractor / on GFF with Contractor access control	✗	✓	✗	✓	✓
Other loss of or damage to Commonwealth Property	✓	✓	✓	✓	✓
Liability for personal injury / death of the Contractor's employees or officers	✗	✓	✗	✗	✗
Third party Claim for death, personal injury, property damage	✓	✓	✓	✓	✗
Third party Claim for IP infringement / breach of confidentiality	✓	✓	N/A	N/A	✗
Third party Claim for other loss or damage suffered by third party	✓	✓	✓	✓	✓

# Types of fault

## Default

- a breach of an express or implied provision of the Contract
- a breach of a general law duty or applicable legislation

## Contractor Default

- Default by the Contractor or a Subcontractor (including their employees and officers)

## Commonwealth Default

- Default by the Commonwealth or a Commonwealth Contractor (including their employees and officers)

## Breach by an Unrelated Party

- breach of a general law duty or applicable law by a person other than the Commonwealth, the Contractor or its Related Bodies Corporate (including their employees and officers)

## Excepted Risk

- an act of God, war, invasion, confiscation by governments, ionising radiation etc

## Wilful Default

- a Default where the act or omission is intended to cause harm, or otherwise involves recklessness

# Commonwealth Property

## Fault-based liability

Contractor liable for damage to Commonwealth Property *caused by Contractor Default*



Reduced to the extent caused by:

- Commonwealth Default
- Excepted Risk
- Breach by Unrelated Party

## Strict liability with exceptions

Contractor *strictly* liable for damage to Commonwealth Property when:

- on Contractor Premises
- being transported or stored by Contractor
- on GFF where access is controlled by Contractor



Reduced to the extent caused by:

- Commonwealth Default
- Excepted Risk

Prior to Acceptance

- Contractor bears the risk of loss of or damage to the Supplies
- Contractor must replace and repair Supplies that are lost or damaged
- No exclusion of Contractor liability for Excepted Risks
- Commonwealth must take reasonable care

After delivery where Contractor has retaken possession

- Standards, warranties and Defect rectification obligations
- Fitness for purpose obligation continues to apply

After Acceptance

# Government Furnished Facilities

## Key objectives

- to ensure that the GFF Licence generally reflects the liability principles
- to ensure that GFF arrangements are made and agreed at the same time as the execution of the Contract

## Structure

- no separate GFF Licence
- Attachment includes basic GFF Licence terms
- optional terms in the "clause bank"
- general clauses of the Contract (liability, indemnity and related arrangements) apply to arrangements under a GFF Licence

## Terms

- Licence aligns with the liability principles
- make good, facility condition and inspections obligations aligned with SOW
- GFF Delay Events occur where the Commonwealth delays the Contractor

Indemnity: a contractual undertaking by a party to hold the other party harmless if an event which triggers the indemnity occurs

Loss arising from the following events or circumstances		Liability will be reduced if:
<b>Contractor's employees and officers</b>	Death, personal injury, disease or illness of Contractor's employees and officers in connection with the Contract	<ul style="list-style-type: none"><li>• a Commonwealth Default</li></ul>

# Contractor indemnities granted to the Commonwealth

Loss arising from the following events or circumstances:		Liability will be reduced due to:
<b>IP and confidentiality</b>	An infringement or alleged infringements of a third party's IP rights, a breach or alleged breach of confidentiality	<ul style="list-style-type: none"><li>• a Commonwealth Default</li></ul>
<b>Other third party Claims</b>	Third party Claims arising from Contractor Default including a claim in respect of: <ul style="list-style-type: none"><li>• death, personal injury, disease, illness</li><li>• loss of or damage to third party property</li></ul>	<ul style="list-style-type: none"><li>• a Commonwealth Default</li><li>• an Excepted Risk</li><li>• breach by an Unrelated Party</li></ul>



- Categories of liability that may be capped
- Three separate mutually exclusive caps:

## ASDEFCON

Loss of / damage to Defence Property  
(excluding Supplies)

Liquidated damages

Loss of / damage to Supplies (including loss of  
use of Supplies)

+

other Losses suffered by the Commonwealth

- Option to include an overall liability cap, in addition to the individual caps above

# Limitation of liability – exclusions

## Some exclusions to limitations of liability

### ASDEFCON

Third party Claims in respect of death / personal injury of any person

Death / personal injury of a Commonwealth Officer

Loss of or damage to third party property

Loss of or damage to Commonwealth Property (other than Defence Property)

Breach of intellectual property rights, confidentiality, privacy or security obligations

Wilful Default (which means "a Default where the breach relates to an act or omission that is intended to cause harm, or otherwise involves recklessness in relation to an obligation not to cause harm")

Criminal offences

Repudiation

Restitution

# Standards, warranties and Defect rectification

**Standards**

Applicable  
laws

Contract  
Standards

"Good  
industry  
practice"

**Warranties**

Ensure Commonwealth  
can obtain the benefit of  
warranties

## Defect rectification

- Obligation to rectify Defects
- Defect Rectification Period
- Testing
- Costs of rectifying Defects
- Latent Defects



# Questions?

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